Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Anthem, Inc., Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278

Reply Comments of Robert Biggerstaff

Robert Biggerstaff submits these comments on the Petition of Anthem, Inc.[1] The Petition should be denied.

As a threshold matter, Petitioner claims that "a great majority" of consumers "welcome such communications." This is mere *ipse dixit*. Did they consider recipients of predictive-dialer hang-up calls and recipients of Petitioner's wrong number robocalls and robotexts when determining whether those calls were "welcomed?"

And what does the term "such communications" mean? Are these prerecorded calls or are they merely autodialed calls with a live operator (i.e. agent-initiated preview mode dialing)? Acceptance of one does not imply acceptance of the other, yet Petitioner deceptively aggregated them all together in the term "such communications."

I cannot help but believe that if there were quantitative metrics of precisely which form of calls (robotext, prerecorded, or autodialed live operator) were preferred over calls from a live human being, that Petitioner would have cited them. The absence of such a citation speaks volumes. I am reminded of the Field Research Study, that was done in

[1] *Anthem, Inc., Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls*, CG Docket No. 02-278 (filed Jun. 10, 2015); *Public Notice*, DA: 15-979 (Aug. 31, 2015).

California and cited by Congress in passing the TCPA.[2] That study showed that a measurable portion (1.6%) of the surveyed phone users "liked" or "didn't mind" obscene or even threatening calls. No one suggested that rules on obscene calls should be relaxed.

Even if a "majority" of consumers "welcome" some subset of those calls, the acknowledgment that a "majority" welcomes some of these calls demonstrates that a number of consumers do not—and those consumers cannot simply be swept out with the trash.

The issue is not a Hobson's choice between receiving "such communications" versus no communication at all—it is between a robot message and a live person. The offense lies in the medium, not the message. This is the hallmark of a valid time, place, and manner restriction. Anthem and commenters supporting the Petition can *always* make their calls with a live human being rather than a robot. Indeed, they need no dispensation from the Commission to make any non-telemarketing calls with live human beings.

As the Court made clear in *Kovacs v. Cooper*, a speaker is not entitled to the cheapest method of distributing its messages. "That more people may be more easily and cheaply reached by [robocalls or text messages], is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when other easy means of [calling] are open."[3] The comments on this docket show that people are sick of nonconsensual robocalls and our government has responded to that appropriately by strictly limiting such automated calling devices. More exemptions and

[2] Field Research Corp., The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls, at 9, cited in S. Rep. No. 177, 102ND Cong., 1ST Sess. 1991 at 2, note 1.

[3] *Kovacs v. Cooper*, 336 U. S. 77, 89 (1949) (emphasis added).

loopholes are not what consumers want.

In addition, to the extent the exemptions sought in this Petition are beyond the existing "emergency" exemption in the TCPA and Commission rules, they are facially content-based exemptions.[4] The law of content-based restrictions on speech has seen important decisions recently, in particular the Court's recent decision in *Reed v. Town of Gilbert*[5] which strengthened the application of strict scrutiny to such restrictions (and exemptions) on speech. In fact, another commenter[6] has raised this issue to claim that the exemption it seeks must be permitted if Anthem's exemption permitted.

A few weeks ago the Fourth Circuit, following *Reed*, invalidated South Carolina's robocall statute because it excepted certain calls based on content or purpose; it permitted debt collection and survey robocalls without consent while prohibiting political robocalls without consent.[7] Many of the exceptions sought by this and other petitions on this docket must fail under the same analysis. Content-based robocall, robotext, and autodialer call exemptions simply can't pass strict scrutiny because the readily available alternative—live calls—is available.

Automated calls by robots are a deeply flawed technology that is inappropriate for communicating critical information in most instances because they are easily confused by

[4] Defining an "emergency" call based on the content of the call is likewise a content-based restriction subject to strict scrutiny.

[5] 135 S. Ct. 2218 (2015).

[6] *See*, Comments of WellCare Health Plans, Inc., dated Sep. 30, 2015. at 5, n.6.

[7] *Cahaly v. Larosa*, No. 14-1680 (4th Cir. Aug. 6, 2015).

answering machines and voicemail prompts.[8] The caller thinks their message was delivered, when in actuality a recording was played into the ether and not heard by anyone because the robot mistakenly identified the voicemail greeting as a live person.

The comments on this docket and in the press demonstrate the universal revulsion and contempt consumers have for robocalls. As a result, the response of many consumers is an instant hang up whenever a robot call is detected—either by the sound of a prerecorded voice or the dead air that indicates an autodialer was employed because the caller considers his time more valuable that the consumer's time.[9]

Absent a widespread emergency, if it is important that the consumer *actually receive* the information, then make the call with a live person, not a robot. Robot calls—including those related to health care—should be reserved only for the most emergent of situations where the volume of calls coupled with the urgency of notice can only be physically accomplished via automated calls and messages. Normal course of business calls that can be scheduled in advance must not be green-lighted for robots to make.

The sum of these exemptions, and others being sought, would largely (and inappropriately) reanimate an EBR exemption for robot calls and texts. Indeed, the

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[8] I have over 30 years in computer and software systems involving computer telephony. I have become quite familiar in my career with various forms of answering machine detection ("AMD") and other call progress monitoring technologies and algorithms, and all are flawed, some significantly under-identify answering machines, sometimes by as much as 30% of calls. This is particularly true with modern voicemail systems as many AMD technologies still in use today were designed for old-school answering machines with cassette tapes. Indeed, one vendor, Noetica, recommends "[d]on't use AMD at all unless it is clear that it would deliver significant benefits."

[9] *See, e.g., Predictive Dialer Pause Puts off Otherwise Responsive Consumers*, <http://www.bizreport.com/2013/09/predictive-dialer-pause-puts-off-otherwise-responsive-consum.html> (last visited Oct. 13, 2015) (study of 2,034 U.S. adults conducted by Harris Interactive, found that half (49%) of consumers hang up when they hear a predictive dialer "pause" when they answer the phone.)

express language of the Petition seeks to exempt these robot communications based on a n EBR with any "health care plans or providers."[10] This would be a dramatic walking back of the Commission's prior decisions. Furthermore, any "EBR" with an insurer, health care plan, or provider is—for a large segment of the public—not a traditional or voluntary relationship. Relationships with insurance companies are largely forced on employees by their employer's choices. Limited lists of health care providers and pharmacies are forced onto insured by EPO and PPO plans. Consumers thus lack the ability to "vote with their wallets" in order to visit consequences upon misusers of communication technologies.

All of the purported salutary benefits to consumers from these calls suggested by Anthem flow from the fact that Anthem is already has some form of "relationship" with the consumer. Thus Anthem is in an ideal position to acquire valid express consent form the consumers who do want to receive these calls. Some consumers who consent may desire a text message rather than a phone call, others may prefer the converse.[11] There is no justification for a one-size-fits-all rule that runs roughshod over the substantial number of consumers who do *not* want to receive these calls and texts.

Thank you very much for your time considering my comments. I remain,

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff

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[10] Petition at 2. *See also*, Petition at 13, suggesting the Commission should "rule that a patient's ***health-care relationship with a provider or health plan***, which already is heavily regulated, constitutes consent to be called or texted at any number connected with the consumer with dialer technology for non-telemarketing calls germane to the relationship with the health plan or provider." (Emphasis added.)

[11] I have known several people who don't "do" text messages even though their phone supports them.